

University of Miami Law School Institutional Repository

University of Miami Inter-American Law Review

6-1-1974

Businessmen's Visas to the United States

A. T. Ulman

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

A. T. Ulman, *Businessmen's Visas to the United States*, 6 U. Miami Inter-Am. L. Rev. 416 (1974)

Available at: <http://repository.law.miami.edu/umialr/vol6/iss2/6>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

BUSINESSMEN'S VISAS TO THE UNITED STATES

ARLENE TUCK ULMAN*

Like most countries, the United States welcomes visitors but must exercise care in accepting immigrants. About ten years ago our Government began actively to encourage aliens to come as visitors and made specific efforts to facilitate their entry.¹ In the previous decade, travel to the United States had more than doubled. In 1962, there were about 780,000 applications for nonimmigrant visas. Now we are even more eager to encourage visitors. In 1973 our overworked consular facilities were expected to handle approximately three million nonimmigrant visa applications. It is no secret that the U.S. Government wishes to compensate for the expenditures of traveling U.S. citizens which contribute to our adverse balance of payments.

All visas issued for entry into the United States can be divided into two basic categories — immigrant visas and nonimmigrant visas. An alien admitted with an immigrant visa may remain in the United States permanently and may, if he wishes, eventually become a citizen. He may also work and engage in most other activities normally open to citizens. An alien admitted with a nonimmigrant visa is limited both as to the time he can remain in the country and as to the activities in which he may engage.

A businessman planning to come to the United States must first decide whether he wishes to come as an immigrant or as a nonimmigrant. One basic factor in making this determination is the time element. Another is family ties. If the businessman plans to come to the States with his family and remain permanently, clearly he will need an immigration visa. If on the other hand he plans to maintain all his family and business ties in his home country and merely intends to complete one or more business transactions in the United States, a nonimmigrant visa valid for a few

*Bachelor of Arts, Cornell University; Juris Doctor, Columbia University; Member of the Bars of New York and the District of Columbia, practicing attorney, Washington, D.C.; Chairman, American Bar Association Immigration and Nationality Committee, Section of International Law; President, Washington Chapter, Association of Immigration and Nationality Lawyers.

months would usually be indicated. These are relatively clear fact situations which fit into neat categories. Human activities are frequently more complex, however.

In deciding whether to apply for an immigrant or a nonimmigrant visa, the applicant should know that any person seeking to enter the United States is presumed to be an immigrant unless he qualifies as a nonimmigrant. There are thirteen distinct nonimmigrant classifications, and the burden is on the applicant for a nonimmigrant visa to establish that he comes within one of these classifications. For the businessman, the first category is comprised of the B visas² issued to visitors for business (B-1) and visitors for pleasure (B-2). In 1972, approximately 4% of the nonimmigrant visas issued were in the B-1 category, 71% were in the B-2 category, and 9% were combination B-1 and B-2's. Thus, more than three-fourths of all nonimmigrant visas issued throughout the world were to visitors for business or pleasure or a combination of both. This is the type of visa suitable for the individual described, who satisfies the American Consul that he has all his permanent business and family ties in his home country and is coming to the States temporarily to transact some business and/or to visit friends and relatives as a tourist.

There is a clear distinction between the B-1 visitor for business and the B-2 visitor for pleasure in regard to work in the United States. The B-2 visitor for pleasure is not permitted to do work of any kind. The B-1 visitor can do certain kinds of work that is considered to come within the definition of business. He can, for example, take orders for goods manufactured abroad, place orders for goods manufactured in the United States, negotiate other contracts related to his trade, and consult with business associates.

Treaty Aliens

A businessman coming to the United States for a more extended stay, but not permanently, may qualify as a treaty alien. By statute,³ nonimmigrant status is given to aliens entering under a treaty of commerce and navigation between the United States and the foreign state of which he is a national. The spouse and children of such an alien accompanying or coming to join him are also given treaty status. We have treaties with the following countries in South and Central America: Argentina, Bolivia, Colombia, Costa Rica, Honduras, Nicaragua, and Paraguay.

Treaty aliens encompass two principal groups. The treaty trader comes to the States solely to carry on substantial trade between the United

States and the foreign state of which he is a national. The treaty investor comes solely to develop and to direct the operations of an enterprise in which he has made or is about to make a substantial investment.⁴ The nonimmigrant treaty trader classification was created by the Immigration Act of 1924⁵ and the treaty investor classification was added by the Immigration and Nationality Act of 1952.⁶ The pertinent Committee reports state that the treaty investor status "is intended to provide for the temporary admission of such aliens who will be engaged in developing or directing the operations of a real operating enterprise and not a fictitious paper operation".⁷

Visas with E-1 classification are given to treaty traders, their spouses and children. Visas with E-2 classification are for treaty investors, their spouses and children.

The majority of treaty traders are self-employed. If the alien is to be employed, the employer must be a foreign person or organization of the same nationality, and the alien must be engaged in a supervisory or executive capacity or he must have qualifications specially needed in the employer's business. Unskilled manual employment usually will not qualify an employee for treaty trade classification. In regard to the requirement that the employer be a foreign person or organization, it is considered that the requirement is satisfied if the employer is a corporation, 51% or more of whose stock is owned by individuals of the applicant's nationality.

Generally, treaty aliens are admitted for a period of one year. The alien may apply for extensions of his temporary admission, and each such extension can be granted for a period not exceeding one year. The application must be accompanied by a report to establish that the applicant is maintaining his treaty status.

Temporary Employees

It was not contemplated that the phrase "Businessmen's Visas" would include visas for persons who perform unskilled labor. Many persons come to the United States to take temporary employment which is of such a nature that they would properly be described as businessmen. As previously discussed, the Immigration Act of 1924 permitted the entry of temporary visitors for business or pleasure. The word "business" was narrowly interpreted, however, not to include aliens coming to the United States to take employment. The 1952 Act sought to remedy this situation by creating a new nonimmigrant class of temporary workers.⁸ This

group of nonimmigrants is described in Section 101 (a) (15) (H) of the Immigration and Nationality Act.⁹ This section was amended in 1970¹⁰ in several of its provisions, the effect of which was to broaden the group of employees who are admissible as temporary workers. As amended, the section now reads:

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

It will be observed that H-1 classification provides for the admission of persons of distinguished merit and ability coming to the United States temporarily to perform services of an exceptional nature requiring such distinguished merit and ability. While a businessman might be a person of distinguished merit and ability, generally nonimmigrant visas under this section are given to professionals such as doctors or college professors or to artists, musicians, and other distinguished entertainers.

H-2 visas are generally used for unskilled employees such as agricultural workers, and labor certifications are required for such persons.¹¹

Before the 1970 Amendment H-2 visas were to be issued to "industrial trainees." "However, the administrative authorities read this language expansively and regarded it as including nonimmigrants who sought to enter at the invitation of an individual or organization for the purpose of receiving instruction in any field of endeavor, including agriculture, commerce, communication, finance, government, transportation, and the professions, as well as in a purely industrial establishment. The 1970 amendments of the statute eliminated the word 'industrial' and specified that this third category of the temporary worker group is available to an alien 'coming to the United States as a trainee.' The legislative materials indicate that this amendment was designed to clarify the statute and to ratify the administrative interpretation and practice."¹²

Under the present statutory provisions, it can be seen that there would be many occasions where business establishments in the United

States would wish to bring in alien businessmen, often of executive rank, to be trained in special aspects of the work of the organization.

Intracompany Transferees

By the same 1970 statute¹³, which enlarged the group of admissible temporary employees, a new classification of nonimmigrants was created to accommodate international executives, or, as they are more accurately termed, "intracompany transferees."¹⁴ These are personnel of transnational business organizations whose employers wish to transfer them from their jobs in a foreign country to a tour of duty in the firm's offices in the United States. Provision for this category of nonimmigrants is contained in the 1970 addition to Section 101(a)(15) of the Immigration and Nationality Act, which provides:

(L) an alien who, immediately preceding the time of this application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

Prior to this amendment executives, management personnel and specialists employed by international concerns scheduled for transfer to American branches, had to enter the United States as immigrants.¹⁵ This was so even though the applicant had no intention of remaining in the States permanently. He could not have qualified as a temporary worker since in most instances the job he was to occupy was permanent in nature, So long as there were no long waiting periods for prospective immigrants from Canada and other Western Hemisphere countries and from Northern Europe, this did not create a serious inconvenience for most of the transnational organizations with branches in the United States.

In 1965, however, Congress had enacted far reaching legislative changes.¹⁶ These became fully effective in 1968. A separate quota for Western Hemisphere immigration was created, and there rapidly developed a backlog of applicants for numbers allotted for Western Hemisphere countries. At the time of the 1970 Amendment the waiting period was about one year. It is now closer to two years.

Commenting on the need for the creation of a nonimmigrant classification for international executives the House Judiciary Committee stated:¹⁷

The testimony of witnesses clearly establishes that existing law restricts and inhibits the ability of international companies to bring into the United States foreign nationals with management, professional, and specialist skills and thereby enable American business to maintain and improve the management effectiveness of international companies to expand U.S. exports and to be competitive in overseas markets.

. . . .

This interchange of personnel is important since it offers an opportunity for an individual to advance within the world-wide organizations without regard to nationality, it enables foreign nationals to learn American management techniques by placing them in key positions in the United States and thus more effectively manage the affiliate operations of U.S. companies when they return overseas. Experience has demonstrated that a real contribution in the conduct of international business results from the cross-fertilization of ideas through the use of special skills of personnel of different nationalities.

It should be observed that the statutory language creating the L visas is broad in concept. The firm which brings in the alien need not be an American firm. Eligibility is given to an employee of any international organization with a branch in the States. The individual must have been so employed continuously for one year prior to the application for the L visa. So employed, however, does include employment with "affiliate or subsidiary" organizations. It should also be noted that the employment is to be "in a capacity that is managerial, executive, or involves specialized knowledge" (emphasis supplied.) This language is not defined in the regulations, but the legislative history of the 1970 Act would indicate that it was contemplated that "key personnel" would be accommodated.

For intracompany transferees the principal alien is given an L-1 visa, and his accompanying or following-to-join spouse and children are given L-2 visas.

Businessmen as Immigrants

Under Section 212(a) (14) of the Immigration and Nationality Act, as amended, persons coming to the United States to perform skilled or

unskilled labor are required to have a labor certification. This is a certification by the Secretary of Labor that "(A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed."

This requirement applies to persons who qualify for third preference as professionals, scientists, or artists, which might include certain businessmen. It also applies to other workers, such as carpenters, automobile mechanics, tailors, etc., found to be in short supply who qualify for sixth preference. While this preference system has not been established for the Western Hemisphere, legislation has been introduced in this session of Congress which would accomplish this.¹⁸ In any event, at the present time, with certain exceptions for immediate relatives, immigrants from Western Hemisphere countries are required to have labor certifications.

Of particular interest to businessmen is a recent exception to the requirement of a labor certification for persons coming to the United States to invest at least \$10,000 in a commercial or agricultural enterprise.¹⁹ It is required, however, that the investor establish that he has had at least one year's experience or training qualifying him to engage in such enterprise.

The determination that an individual qualifies as an investor is made by the Immigration and Naturalization Service of the U.S. Department of Justice if the alien is in the United States and desires to apply for adjustment of status to that of an immigrant. Adjustment of status is not now available to residents of the Western Hemisphere, but this procedure may become available to them in the not too distant future. Until, then, however, persons wishing to enter the United States as immigrant investors exempt from the labor certification requirement will have to satisfy the American Consul in their respective countries that they are so qualified.

The application for investor status should be well documented with supporting evidence. The investment can be established by cancelled checks, receipts, bank letters, etc. The existence of the enterprise in which the alien invests may be established by such evidence as a corporate

charter, partnership agreement, license or other official authorization to engage in business, bank letters, financial statements, contracts, etc. There should also be evidence that there is a place in the United States in which the enterprise will be operated. This would consist of a deed or lease or option to purchase or rent. Finally, the alien should have evidence of his own qualifications extending over a period of one year to engage in the enterprise. This could consist of letters from former employers or trainers, or business associates. Also pertinent would be certificates, degrees, professional or journeymen licenses or other documents indicating that the applicant has been found qualified to engage in an occupation or business related to the enterprise.

Thus it can be seen that the United States welcomes foreign businessmen in many different capacities and for varying periods of time. No guarantees can be made on the value of the dollar, or the prospects of inflation or deflation, but it should be clear that the role of a businessman in the United States now would not be dull.

NOTES

¹In 1961, legislation was enacted to facilitate and promote travel to the U.S., Act of June 29, 1961, P.L. 87-63, 75 Stat. 129. See also The Report of the Industry Government Special Task Force on Travel (G.P.O. 1968) which made several recommendations to encourage travel to the United States by aliens.

²This designation is derived from Section 101 (a) (15) of the Immigration and Nationality Act of 1952, as amended 8 U.S.C. 1101 (b) (15) which states that "The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

- (B) An alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

³Section 101 (a) (15), Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 (a) (15), provides nonimmigrant status for:

- (E) An alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct operations of an enterprise in which he has invested, or an enterprise in which he is actively in the process of investing a substantial amount of capital;

⁴The treaty investor who has nonimmigrant status is to be compared with the investor who enters as an immigrant but is not required to obtain the labor certification prescribed by Section 212(a) (14) of the Immigration and Nationality Act. See page 13, *infra*.

⁵Act of May 26, 1924, 43 Stat. 153.

⁶Act of June 27, 1952, P.L. 82-414, 66 Stat. 163, 8 U.S.C. 1101, et seq.

⁷S. Rep. 1137, 82d Cong., 2d Sess., 20; H. Rep. 1365, 82d Cong., 2nd Sess., 44. See also Gordon and Rosenfield, *Immigration Law and Procedures*, §2.11.

⁸See *Ulman* "International Executives, Foreign Fiancees, Temporary Workers, and Exchange Visitors," 5 *The International Lawyer*, 89, 93 et seq.

⁹8 U.S.C. 1101 (a) (15) (H).

¹⁰Public Law 91-225, Apr. 7, 1970.

¹¹Bernsen, "Lawful Work for Nonimmigrants," 20 *IN Reporter* 22 (1971).

¹²Gordon and Rosenfield, *Immigration Law and Procedure*, p. 2-76, 2-77.

¹³Public Law 91-225, April 7, 1970.

¹⁴See Gordon and Rosenfield, *Immigration Law and Procedure*, § 2.16 B.

¹⁵See *Ulman*, *International Executives, Foreign Fiancees, Temporary Workers, and Exchange Visitors*, 5 *The International Lawyer*, 89, 90 (1971).

¹⁶Act of Oct. 3, 1965, Public Law 89-236, 79 Stat. 911.

¹⁷H. Rep. 91-851, 91st Cong. 2nd Sess., p. 3.

¹⁸H. R. 981, 93rd Cong. 1st Sess.

¹⁹8 Code of Federal Regulations § 212 (b).